**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **ELIZABETH JOY AYERS** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,030,145 |
| **PIONEER MANOR NURSING HOME** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **KANSAS ASSOCIATION OF HOMES FOR THE AGING INSURANCE GROUP** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant appeals the April 12, 2007 Award of Administrative Law Judge Pamela J. Fuller. Claimant was awarded permanent partial disability benefits for a 5 percent whole body disability on a functional basis, but denied additional benefits for a work disability after the Administrative Law Judge (ALJ) determined that claimant was terminated for cause and thus not eligible for a work disability.

Claimant appeared by her attorney, James R. Roth of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, D. Shane Bangerter of Dodge City, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on July 20, 2007.

## ISSUES

What is the nature and extent of claimant's injuries and disability? Claimant contends she is entitled to a permanent partial work disability above her functional disability for the injuries suffered on February 20, 2006. Respondent argues claimant was terminated for cause and the wage she would have been paid would be at least 90 percent of the average weekly wage claimant was earning on the date of accident. Therefore, claimant would be limited to her functional disability. Respondent also alleges claimant did

not put forth a good faith effort to find work after her termination from respondent and the wage which should be imputed would also exceed 90 percent of claimant's average weekly wage. Again, claimant would be limited to her functional disability.

## FINDINGS OF FACT

Claimant worked for respondent as a nurse's assistant, when, on February 20, 2006, she felt a sharp pain in her back while helping to elevate a patient's bed. Claimant reported the injury to the nurse in charge and filled out an accident report. Claimant was allowed to go to a doctor and she chose to go to Dr. Hager, a doctor who had treated her in November 2005 after she fell off a ladder and cracked a vertebrae, which Dr. Hager at that time said would heal by itself. Claimant was taken off work for two weeks, after the most recent injury, and then placed on light duty. After claimant returned to work, she continued to experience back pain, and occasionally missed work due to the pain. Respondent was willing and able to accommodate the light-duty restrictions placed on claimant.

This was not claimant's first employment experience with respondent. Claimant had worked for respondent from September 14, 2004, through November 24, 2005, as a nurse's assistant. It was during this first period of employment that claimant suffered the original non-work-related injury when she fell off the ladder. A work restriction from Alejandro Neira, D.C., dated September 12, 2005, limited claimant's lifting to a maximum of 25 pounds. Even though this injury was not work related, respondent was willing to accommodate claimant's restrictions. Claimant resigned from that job with respondent on November 24, 2005. She did work on a PRN basis on January 7 and January 9, 2006. When claimant was rehired on January 17, 2006, it was on a part-time basis.

After the February 20 injury, claimant remained on light duty until April 7, 2006. She had been treated by several doctors in the interim, including Guillermo Garcia, M.D., and Dr. Williams, who later referred her to board certified neurosurgeon Paul S. Stein, M.D.[1] However, it was Dr. Hager who released claimant to regular duties on April 7, 2006.

Between claimant's return to work on April 7 and May 6, 2006, claimant began missing work. Claimant was given a warning for her attendance in April 2006. Claimant was not restricted by any doctor during this time.

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[1] R.H. Trans. at 9. (Note: At his deposition, Dr. Stein testified that claimant was referred to him by Ms. Mendoza. (Stein Depo. at 5.) At her deposition, claimant testified that she was sent to Dr. Stein by the workers compensation insurance company. (Cl. Depo. (March 15, 2007) at 15.))

Claimant was examined by Dr. Garcia on May 8, 2006. At that time, she was limited by the doctor to clerical or office work. Michelle Mendoza, a workers compensation nurse case manager representing respondent, was present at the examination. Ms. Mendoza told claimant she would find out if respondent had clerical work available. Claimant testified Ms. Mendoza later contacted claimant and advised no clerical work was available. May 3, 2006, is the last day claimant worked for respondent. Claimant missed work on May 6 and 7, was sick on May 10, and was a "no call, no show" (NCNS) on May 12. Claimant was again "NCNS" on May 19, 20 and 21. Claimant was also scheduled to work on May 23, 26, 29 and 30, but failed to show for work.[2]

While still working for respondent, claimant began working part time for High Plains Educational Cooperative (High Plains) on April 4, 2006. This is an elementary school in Ulysses, Kansas. Claimant worked three hours per day, three days per week, earning $7.60 per hour. The job description for the para-educator job with High Plains indicates claimant would have to lift up to 50 pounds. Claimant stated she never had to lift anything heavy with High Plains. Mike Lewis, the director of High Plains, testified that claimant never requested any type of accommodation while working for High Plains. He did state that High Plains regularly accommodated people with restrictions or disabilities. They had even hired a para-educator in a wheelchair. In August 2006, claimant contacted Ginny Titus, a teacher with High Plains, and was told there would soon be a child with handicaps at the school. Ms. Titus told claimant she would have to do some lifting. Claimant agreed with Ms. Titus that it would be in claimant's best interest to quit the High Plains job, which she did. Claimant made no attempt to contact Mike Lewis regarding accommodations with the High Plains job. Claimant submitted her resignation from High Plains by letter dated August 18, 2006. Claimant stated the resignation was due to her medical restrictions.

Claimant was referred by Ms. Mendoza[3] to Paul S. Stein, M.D., for an examination on July 14, 2006. Dr. Stein diagnosed claimant with severe degenerative disc disease, which he "felt" was aggravated by the February 20, 2006 work incident.[4] He did not feel that claimant was a candidate for surgery, and rated her at a 5 percent whole body permanent partial impairment pursuant to the fourth edition of the AMA *Guides.*[5] The rating was based on the DRE Lumbosacral Category II. Dr. Stein also recommended that claimant be referred to someone capable of monitoring claimant's future pain medications. Dr. Stein restricted claimant to lifting up to 25 pounds twice a day; 20 pounds occasionally;

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[2] James Depo. at 11-13.

[3] Stein Depo. at 5. (Note: At the regular hearing, claimant testified that Dr. Williams referred her to Dr. Stein. (R.H. Trans. at 9.) At her deposition, claimant testified that she was sent to Dr. Stein by the workers compensation insurance company. (Cl. Depo. (March 15, 2007) at 15.))

[4] Stein Depo. at 8.

[5] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

and 10 pounds repetitively. Claimant was to avoid lifting from below knuckle height or to above chest height. Claimant was also to avoid bending and twisting of the lower back, and claimant should alternate sitting, standing and walking. Dr. Stein was not told of claimant's earlier restrictions from Dr. Neira. Dr. Stein was asked to review a task list prepared by vocational expert Jon Rosell, Ph.D. Of the 42 non-duplicative tasks on the list, Dr. Stein opined claimant was unable to perform 27, for a 64 percent task loss. Claimant did not provide respondent or High Plains with either Dr. Garcia's or Dr. Stein's restrictions.

In August 2006, claimant attempted to obtain unemployment benefits. When claimant filed, she was first told she could not get unemployment while collecting workers compensation. Claimant was later told by the unemployment office that she had been terminated by respondent. Claimant then called respondent's representative, Gloria Fox, and requested verification of her employment status. Claimant was provided a letter, dated August 11, 2006, which verified that claimant had been terminated effective May 6, 2006. However, Gladys James, respondent's director of nursing, testified that it was her job to terminate employees. Ms. James had never terminated claimant. Ms. James also testified that she looked for a letter of termination on claimant, but was unable to find one. Ms. James did note that due to the number of "no call, no shows" on claimant's record, claimant would have been terminated. Ms. James also stated that respondent would have accommodated the restrictions placed on claimant by Dr. Stein.

Claimant testified that she began looking for a job after Dr. Stein's July 2006 examination. However, a list of places claimant sought employment, which claimant provided at her March 15, 2007 deposition, begins on September 25, 2006.[6] This list, which ends on February 19, 2007, contains over 100 places claimant either went to or called about a job. A second list of claimant's job searches begins February 20 and ends either on March 13 or 14, 2007.[7] Claimant testified that she continues to look for jobs almost every day, except on days she does not feel able to.[8] A January 18, 2007 letter from respondent's attorney lists several places with openings, as provided by respondent's vocational expert Doug Lindahl. This letter was provided to claimant's attorney and subsequently forwarded to claimant. The record indicates that, while claimant contacted almost every employer on the list, she was unable to obtain a job.

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[6] Cl. Depo. (Mar. 15, 2007) , Ex. 9.

[7] Cl. Depo. (Mar. 15, 2007) , Ex. 10.

[8] Cl. Depo. (Mar. 15, 2007) at 32-33.

## PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[9]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[10]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[11]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[12]

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[13]

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[9] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[10] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[11] K.S.A. 2005 Supp. 44-501(a).

[12] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[13] K.S.A. 44-510e(a).

K.S.A. 44-510e defines permanent partial general disability as,

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[14]

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[15] and *Copeland*.[16] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[17]

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.[18]

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[14] K.S.A. 44-510e.

[15] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[16] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[17] *Id.* at 320.

[18] K.S.A. 44-510e.

Recently, in *Graham*[19], the Kansas Supreme Court said:

> When a statute is plain and unambiguous, we must give effect to its express language, rather than determine what the law should or should not be. We will not speculate on legislative intent and will not read the statue to add something not readily found in it. If the statute's language is clear, there is no need to resort to statutory construction. *Steffes v. City of Lawrence*, 284 Kan. ____, Syl. 2, ___ P.3d ___(No. 96,838, filed June 22, 2007); *Perry v. Board of Franklin County Comm'rs*, 281 Kan. 801, 809, 132 P.3d 1279 (2006).
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> The Court of Appeals erred in overlooking the import of this plain language in the statue, instead attempting to divine legislative intent from a review of legislative history. See *Graham I*, 36 Kan. App. 2d at 525. In our view, that step is unnecessary. Statutory interpretation begins with the language selected by the legislature. If that language is clear, if it is unambiguous, then statutory interpretation ends there as well. See *Perry*, 281 Kan. at 809.
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> . . .
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> The panel began its discussion by equating the statute's use of the phrase "engaging in work" to "able to earn." K.S.A. 44-510e(a) prohibits permanent partial general disability compensation if an employee is "engaging in work" for wages equal to 90 percent or more of the average preinjury wage. The panel said the record was insufficient to support claimant's contention that he was "unable to earn" that amount. We see a distinction with impact between the actual "engaging in work" of the statue and the theoretical "able to earn" of the Court of Appeals. Claimant may be theoretically able to earn more, but substantial evidence supports the Board's determination that his actual pain prevents the theory from becoming a reality.
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> The panel also advanced a policy rationale for its decision--its desire to avoid manipulation of a system that permitted a work disability award "based purely on reported pain." *Graham I,* 36 Kan. App.2d at 527. It wanted to avoid a situation where a worker could control "his or her workweek to assure that, *on average*, the postinjury weekly wage will not exceed the 90 percent of preinjury wage that would make the worker ineligible for the award, even through [sic] the worker demonstrates a clear ability to earn the 90 percent any time desired." 36 Kan. App. 2d at 527. There are at least three reasons why this rationale was inappropriate. First, public policy is usually the arena of the legislative branch. Second, even if the judiciary was charged with setting public policy, other mechanisms exist for detection of fraudulent workers compensation claims. See K.S.A. 2006 Supp. 44-501; K.S.A. 44-510e(a); K.S.A. 2006 Supp. 44-551; *Lowmaster v. Modine Mfg. Co*., 25 Kan. App. 2d 215, 219, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998). And, third, there is

[19] *Graham v. Dokter,* ___Kan. ____, _____P.3d. ____, (No. 95,650 filed July 13, 2007).

> absolutely no evidence in the record that this particular claimant was "faking his pain or lack of ability to work full time."

In *Graham*, the Supreme Court also said that there was no evidence Graham was attempting to manipulate the workers compensation system. Thus, the Supreme Court did not reach the issue of whether the literal language of K.S.A. 44-510e(a) would be applied to allow an award of a work disability under those facts. Nevertheless, the *Graham* case may signal a willingness on the part of the Supreme Court to revisit those cases where the judiciary decided public policy required the court to depart from the plain language in the statute. The Board, therefore, will continue to follow the *Foulk* and *Copeland* line of cases until an appellant court decides that K.S.A. 44-510e(a) does not require the fact finder to impute a wage based upon a claimant's wage earning ability whenever a claimant fails to prove he or she made a good faith effort to find appropriate employment postinjury.

Claimant's award in this matter was limited to a 5 percent whole body permanent partial disability on a functional basis after the ALJ determined claimant had not put forth a good faith effort to retain her job with respondent, being terminated for cause. However, claimant testified her attendance problems which began after her work-related injury, were, on many occasions, related to her injuries. Claimant missed many days of work after the treating physician, Dr. Garcia, restricted her to clerical work only. Claimant was advised that there was no clerical work available, and thus she did not return to work after her conversation with Ms. Mendoza. It is troubling that claimant, after being given restrictions by Dr. Garcia and Dr. Stein, failed to contact respondent regarding whether the restrictions could be met, especially considering the fact respondent had accommodated similar restrictions in the past. It is also troubling how respondent handled the actual termination, sending claimant a letter several months after the fact and back dating the termination to May 6, 2006. Additionally, Gladys James, the person supposedly in charge of respondent's terminations, was unaware of the actions of respondent. The Board finds the actions of respondent suspect in this regard. The termination appears to have been an afterthought. The Board finds the termination of claimant was not justified and the ALJ's denial of a permanent partial work disability on those grounds is reversed.

The Board must next look at claimant's actions after the termination to determine if claimant put forth a good faith effort to obtain employment. On its face, claimant's efforts to obtain work appear to be very good. Claimant provided a significant list of contacts with various employers. Claimant even followed through with the contacts suggested by respondent's vocational expert Mr. Lindahl. However, a very significant part of claimant's post job search is troubling. Claimant quit her job with High Plains without verifying if High Plains would accommodate her restrictions. Even after Mr. Lewis testified (at his deposition taken February 26, 2007) to High Plains' willingness to accommodate claimant's restrictions and that High Plains had immediate openings, claimant testified (at her deposition on March 15, 2007) that she had made no attempt to contact High Plains. This convinces the Board that at least a portion of claimant's post-injury job search, a very significant portion, was not done in good faith. The Board, therefore, finds a wage should

be imputed to claimant based on the available weekly wage with High Plains. Mr. Lewis testified that High Plains typically hired para-professionals to work 35 hours per week. He also testified that claimant was earning $7.60 per hour when working for High Plains. This computes to an average weekly wage of $266.00. When compared to claimant's stipulated wage of $279.79, the High Plains wage would be 95 percent of the post-injury average weekly wage with respondent. Pursuant to K.S.A. 44-510e, claimant would be limited to her functional impairment of 5 percent.

## CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ granting claimant a 5 percent permanent partial whole body disability on a functional basis should be affirmed. Claimant failed to put forth a good faith effort to find employment after her termination from respondent. The Board imputes the wage claimant would have been earning had she pursued the available jobs with High Plains. Pursuant to K.S.A. 44-510e, claimant is limited to her functional impairment of 5 percent.

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Pamela J. Fuller dated April 12, 2007, limiting claimant to a 5 percent permanent partial whole body disability on a functional basis, should be, and is hereby, affirmed, although on other grounds.

**IT IS SO ORDERED.**

Dated this ____ day of August, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James R. Roth, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge